Nos. 84-237, 84-238
84-239

In the

Supreme Court of the United States

October Term, 1984

Yolanda Aguilar, *et al.*
Appellants

v.

Betty-Louise Felton, *et al.*
Appellees

and

Secretary, United States Department of Education
Appellant

v.

Betty-Louise Felton, *et al.*
Appellees

and

Chancellor of the Board of Education of the City of New York, *et al.*
Appellants

v.

Betty-Louise Felton, *et al.*
Appellees

On Appeal from the United States Court of Appeals for the Second Circuit

Brief Amicus Curiae of Citizens for Educational Freedom in Support of Appellants

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INTEREST OF THE AMICUS

Citizens for Educational Freedom ("CEF") is an organization composed entirely of individual citizens, including parents of students in public and nonpublic schools, both secular and religious. CEF is not dedicated to any one religious belief, nor indeed to religion over nonreligion. It is a pluralistic organization dedicated to upholding the educational rights of parents and children. It is firmly committed to the belief that the education of children is primarily a matter of family and personal concern. Accordingly, CEF works through the legislative and judicial processes, as well as through public information programs, to support and advocate freedom of educational choice, diversity of education, and above all quality education for all children.

Consequently, *amicus* is concerned about the practical implications of the lower court's reasoning. CEF wishes to call this Court's attention to portions of the lower court's analysis which threaten a broad spectrum of legislative alternatives for assisting underprivileged children nationwide in a wide variety of nonpublic schools. It is not our intention to insist that all such legislative alternatives are necessarily constitutional. Our point is far more modest: Many of them may well be constitutional. Their possibilities should not be extinguished prematurely by the appellate court's less-than-subtle constitutional analysis.

Since CEF is concerned primarily with the broad implications of the lower court's reasoning, rather than just the particular program at issue, it does not believe its interest will be represented adequately by the parties.

SUMMARY OF ARGUMENT

This Court consistently has taught that Establishment Clause analysis admits of no *per se* rules. Rather, its criteria are guidelines for use in determining whether the challenged conduct tends to establish religion.

In spite of this Court's teaching, the court below erroneously has made a *per se* test of this Court's entanglement criterion. Furthermore, the court below has sought to implement its *per se* "test" with yet another *per se* rule: *no* public school teachers may *ever* teach nonpublic school children on nonpublic school premises, regardless of the circumstances.

These rigid *per se* rules do violence to the logic both of the entanglement criterion and the Establishment Clause itself. They also threaten to preempt a broad range of legislative options for serving disadvantaged nonpublic school children. A rigid *per se* rule should not be employed with respect to on-premises instruction of nonpublic school students by public school teachers. Rather each case should be decided on its facts.

The entanglement criterion is itself not a *per se* rule, and cannot be so applied. Deciding the question of entanglement involves judging the propriety of the church-state relationship in question. That propriety is itself the ultimate issue. Therefore, to attempt to decide establishment *solely* on the criterion of "entanglement" would be circular. The entanglement criterion is better viewed as simply providing a valuable perspective on the totality of the circumstances.

For purposes of Establishment Clause analysis, those governmental actions which potentially inhibit religion should be distinguished from those which potentially advance religion. Inhibition is by definition not establishment, but the opposite of establishment. If anything, inhibition is an abridgement of

free exercise. Consequently, taxpayer plaintiffs lack standing to raise the issue of government inhibition of religion in non-public schools, since taxpayer standing cannot be predicated upon the free exercise rights of third parties. The dilemma posed by appellees — i.e., that either the Title I teachers risk advancing religion or their supervisors inhibit it — is therefore illusory.

The record in this case, viewed either on the totality of the circumstances, or against the *Lemon* criteria, demonstrates that New York's Title I program has not established religion.

ARGUMENT

I. THIS COURT CONSISTENTLY HAS TAUGHT THAT ITS ESTABLISHMENT CLAUSE CRITERIA ARE NOT "TESTS," BUT GUIDELINES.

In framing its Establishment Clause doctrine, this Court has repeatedly emphasized that "[i]n each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch v. Donnelly,* 104 S. Ct. 1355, 1361 (1984).[1] Thus, the Court has refused to invalidate mechanically every governmental action which benefits religion. *Id.* Instead,

> the Court has scrutinized challenged legislation or official conduct to determine *whether, in reality, it establishes a religion or religious faith, or tends to do so. Id.* (emphasis supplied; citation omitted).

To be sure, the Court has developed useful criteria to aid it in this determination. At the same time, however, the Court has emphasized that the utility of these criteria must be kept in perspective. The criteria "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but *serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." Meek v. Pittenger,* 421 U.S. 349, 358-59 (1975) (emphasis supplied; citation omitted). This is true of the "principal evils" identified in *Walz.*[2] The Court has noted

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[1]Cf. *Walz v. Tax Commission,* 397 U.S. 664, 669 (1970) ("rigidity could well defeat the basic purpose [of the Religion Clauses]").

[2]I.e., "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz, supra,* 397 U.S. at 668.

that their presence cannot be measured with any "constitutional caliper." *See Tilton v. Richardson,* 403 U.S. 672, 677 (1971).[3] It is likewise true of the three criteria collected in *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971). The Court has recently reminded us that it is unwilling "to be confined to any single test or criterion in this sensitive area. (citations omitted) In fact, on occasion, the Court has not even applied the *Lemon* 'test.' " *Lynch, supra,* 104 S. Ct. at 1362.

Accordingly, when the Court has chosen to use the *Lemon* criteria, it has called for circumspection. This is especially true in its use of the entanglement criterion:

> Judicial caveats against *entanglement* must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier *depending on all the circumstances of a particular relationship. Lemon, supra,* 403 U.S. at 614 (emphasis supplied).[4]

In sum, this Court has taught that the ultimate inquiry is "whether, in reality, [the challenged conduct] establishes a religion or religious faith or tends to do so." *Lynch, supra,* 104 S. Ct. at 1361. Comparing the conduct to the "principal evils" isolated in *Walz* and to the three criteria set forth in

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[3] "There is no single constitutional caliper that can be used to measure the precise degree to which any of these three factors are present or absent." *Tilton v. Richardson,* 403 U.S. 672, 677 (1971).

[4] *See also, Roemer v. Board of Public Works,* 426 U.S. 736, 766 (1976) (there is "no exact science in gauging the entanglement of Church and State"); *Hunt v. McNair,* 413 U.S. 734, 746 (1973) ("the degree of entanglement arising from inspection of facilities . . . varies in large measure with the extent to which religion permeates the institution"); *Tilton, supra,* 403 U.S. at 685 (various factors can "substantially diminish the extent and the potential danger of the entanglement").

Lemon may well be helpful in discerning the answer. But,

> [t]here are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. *The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired. Tilton, supra,* 403 U.S. at 678 (emphasis supplied).

II. THE ENTANGLEMENT CRITERION IS NOT A PER SE TEST, BUT RATHER MERELY PROVIDES A PERSPECTIVE ON THE TOTALITY OF THE CIRCUMSTANCES.

Contrary to this Court's teaching, the lower court read the *Lemon* criteria as three *per se* rules, or "tests." *See Felton v. Secretary, United States Department of Education,* 739 F.2d 48, 65 (2d Cir. 1984). The lower court further believed that the entanglement "test" included yet another *per se* rule, derived from *Meek. See Id.,* at 64. But subtle values are not well served by such dogmatic rigidity. It is no doubt true that "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Marsh v. Chambers,* 103 S. Ct. 3330, 3340 (1983) (Brennan, J., dissenting) (footnote omitted). But they would be mistaken.

Questions of educational policy provide a similar temptation. Rigid dogma is comforting. Yet, as with legislative prayer,

> [t]he task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually *it requires a careful evaluation of the facts of the particular case. Wheeler v. Barrera,* 417 U.S. 402, 426 (1974) (citations omitted; emphasis supplied).

A. The Lower Court's Caricature of Meek Produced a Rigid and Impermissible Per Se Rule

Lynch teaches that in Establishment Clause analysis "no fixed, *per se* rule can be framed." *Lynch, supra,* at 1361. However, the Court below, ignoring *Lynch,*[5] found that there *was* a *per se* rule — i.e., that public school employees could *never* teach or counsel on nonpublic school premises regardless of the circumstances. The lower court writes,

> whatever the situation may be with respect to other forms of government aid, no part of the teaching or counselling function can be performed by public school employees [on nonpublic school premises], *whether under a good plan, a bad plan, or no plan at all. Felton, supra,* 739 F.2d at 67 (emphasis supplied).

This is a bald, *per se* rule. The facts of particular cases are deemed irrelevant. Indeed, in order to pronounce its *per se* rule, the Court of Appeals deliberately disregarded an extensive trial record which showed, *inter alia,* no evidence of a "complaint by a Title I teacher of interference by nonpublic school authorities or of any reports by supervisors that teachers have engaged in religious activity." *Felton, supra,* 739 F.2d at 53. The record notwithstanding, the court below concluded that if the supervisors had been effective, then there *must have been,* such "comprehensive, discriminating and continuing state surveillance"[6] as to be *per se* unconstitutional. *See Felton,*

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[5]In fact, the Court below deliberately "confined itself" to this Court's prior decisions on government aid to religious schools. See *Felton, supra,* 739 F.2d at 54. In so doing, it effectively ignored this Court's subsequent teaching on Establishment Clause analysis generally.

[6]*See Lemon, supra,* 403 U.S. at 619.

supra, 739 F.2d at 64.

The Court below thus has promulgated not only a *per se* rule, but a Catch-22. In nonpublic schools, if public school teachers are not violating *Lemon's* primary effect criterion, then their supervisors *must* be violating *Lemon's* entanglement criterion, regardless of the evidence. Under this *per se* rule, no conceivable program of on-premises instruction of nonpublic school students by public school employers could *ever* be constitutional. This is a dangerous misreading of *Meek*. What in *Meek* was a guideline for discerning potential establishment, has mutated into a *per se* rule which conclusively presumes establishment in every conceivable case.[7]

The lower court's *per se* rule further presumes that all nonpublic school settings are alike. Of course, all nonpublic school environments are not alike. There are, for instance, significant differences between Catholic and other nonpublic schools. Moreover, there are now significant differences between the environment that actually exists in many Catholic school systems, and that presupposed by the court below. The lower court adopted a 1972 characterization of Catholic schools.[8] In

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[7]This seems to have been an affirmative policy decision by the court below. "To relax *Meek's* ban on sending public school teachers and counsellors into religious schools . . ., on the basis of a demonstration that this has not advanced religion in New York City Schools, would let the genie out of the bottle." *Felton, supra*, 739 F.2d at 67. What genie? The purpose of this litigation is to determine whether *this program* has tended to establish religion. If it has not, it should not be struck down in order to further the Second Circuit's policy of discouraging similar programs not before the court.

[8]This list of characteristics was borrowed from *Meek*, and ultimately from *Committee for Public Education and Religious Liberty v. Levitt*, 342 F. Supp. 439, 440-41 (S.D. N.Y. 1972). It is thus twelve years old.

fact, much has changed in the past twelve years.[9]

It is not the purpose of this brief to argue that it is constitutionally permissible to send public school teachers into all of the varied nonpublic school systems nationwide. Our point is far simpler: It *may* well be constitutionally permissible in a number of cases. The lower court's *per se* rule should not be allowed to preempt that possibility.

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[9]For instance, as the chart below demonstrates, the proportion of religious and lay teachers has been dramatically reversed nationally.

ITEM	UNIT	1960	1965	1970	1975	1977	1978	1979	1980	1981	1982
Elementary schools	Number	10,501	10,879	9,362	8,340	8,204	8,150	8,100	8,043	7,996	7,950
Pupils enrolled	1,000	4,373	4,492	3,355	2,525	2,421	2,365	2,293	2,269	2,266	2,225
Teachers, total	1,000	108	120	112	99	100	99	98	97	97	97
Religious	1,000	79	76	52	35	32	29	27	25	24	22
Lay	1,000	29	44	60	64	68	70	71	72	73	75
Secondary schools	Number	2,392	2,413	1,981	1,653	1,503	1,564	1,540	1,516	1,498	1,482
Pupils enrolled	1,000	880	1,082	1,008	890	867	853	846	837	828	801
Teachers, total	1,000	44	57	54	50	51	49	49	49	49	49
Religious	1,000	33	38	28	20	18	16	15	14	14	13
Lay	1,000	11	19	26	30	33	33	34	35	35	36

Source: National Catholic Educational Association, Washington, D.C., *A Statistical Report on Catholic Elementary and Secondary Schools for the Years 1967-68 to 1969-70,* and *U.S. Catholic Schools, 1973-74,* and National Catholic Educational Association/Ganley's, *Catholic Schools in America,* annual. *Published in, Statistical Abstract of the United States: 1984,* at 156 (U.S. Bureau of the Census, 104th ed. 1983).

B. Even The Entanglement Criterion Itself Is Not A Per Se Rule

Even apart from its misreading of *Meek*, the court below erroneously believed that the entanglement criterion was itself a *per se* rule. In fact, the court explicitly based its decision solely on "the entanglement test . . . without need to decide whether New York City's program fails *Lemon's* 'primary effect' test." *Felton, supra*, 739 F.2d at 65. Moreover, the court below even dismissed a number of arguments merely because "they bear on the question of 'primary effect,' not on the entanglement issue. . . ." *Id.*, at 70.

Once again, this disregards the constant teaching of this Court that Establishment Clause analysis admits of no *per se* rules. *See Lynch, supra*. Beyond that, however, *amicus* respectfully suggests that the very nature of the entanglement criterion prevents its use as a *per se* rule.

It is axiomatic that not every relationship between government and religion is an excessive entanglement.[10] Some relationship is inevitable.[11] Other relationships are required by the government's affirmative duty to accommodate religion.[12] Indeed, even some collaboration between government and

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[10]Cf. *Lynch, supra*, 104 S. Ct. at 1361. ("Rather than mechanically invalidating all governmental conduct . . . that . . . give[s] special recognition to religion . . . . the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.")

[11]*See, Lemon v. Kurtzmann*, 403 U.S. 602, 614 (1971).

[12]Cf. *Lynch, supra*, 104 S. Ct. at 1359.

religiously-run institutions is salutary and in "the best of our traditions."[13]

Moreover, which relationships between government and religion are benign, and which are excessive entanglements, cannot reliably be determined merely from the extent of mutual contact. The military Chaplains' Corps involves a far greater number and complexity of contacts between church and state than did the zoning regulation in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982). Yet the chaplaincy program is almost certainly constitutional.[14] The zoning regulation in *Larkin* was not. It "enmesh[ed] churches in the exercise of substantial governmental powers" and was therefore an establishment of religion. *Id.*, at 126.

Thus, whether a given relationship is excessively entangling depends not upon the *extent* of the relationship but upon the *propriety* of the relationship.[15] However, the propriety of the

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[13]*See Zorach v. Clausen*, 343 U.S. 306, 313-14 (1948) ("When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.") Cf. *Bradfield v. Roberts*, 175 U.S. 291 (1899) (government support of hospital run by Roman Catholic nuns is not an establishment of religion).

[14]In fact, it may be constitutionally required. Cf. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 296-297 (1963) (Brennan, J., concurring); *Id.*, at 309 (Stewart, J., dissenting); *Id.*, at 306 (Goldberg, J. concurring). *See generally*, Note, *The United States Military Chaplaincy Program: Another Seam In the Fabric of Our Society?*, 59 *Notre Dame L. Rev.* 181 (1983).

[15]Cf. *Lemon, supra*, 403 U.S. at 615 (question of entanglement turns upon "the character and purposes of the institutions that are benefitted; the nature of the aid that the State provides, and the relationship between the government and the religious authority").

relationship is itself the ultimate issue — i.e., whether the relationship is one which tends to establish religion.

Accordingly, any attempt to decide the question of establishment *solely* on an entanglement "test" would be quite circular. In practice, such determinations probably would degenerate into either *ad hoc* evaluations or, as in the case of the court below, further *per se* rules.

This is not to say that the entanglement criterion is simply a makeweight. It is not. Rather, it provides a valuable perspective on the totality of the circumstances. As the Court noted in *Lemon,* "involvement or entanglement between government and religion serves as a warning signal [in advance of] where the 'verge' of the precipice lies." *Lemon, supra,* 403 U.S. at 624-25.[16] A high degree of involvement may alert the court to the need for a heightened degree of scrutiny. It is a helpful clue in the Court's investigation. Thus the entanglement criterion provides a valuable perspective. It cannot, however, provide a litmus test.

Furthermore, while entanglement is a helpful warning signal that one is *approaching* the verge, it is not necessarily a sign that one is *at the verge.* There may yet be space.

True, brinksmanship is hardly a policy of choice. Nonetheless, it is often a practical necessity as legislatures seek to reach the important objective of providing an adequate education to disadvantaged children, while still respecting the parental right to educate. *See Pierce v. Society of Sisters,* 268 U.S. 510 (1925). In many cases the distance between a "warning signal" and "the verge" could well represent an important educational

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[16]Cf. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 797-98 (1973) (political divisiveness, while alone not enough to invalidate a statute, is nonetheless a "warning signal").

opportunity for a significant number of children. This is a possibility which should not be foreclosed to all legislatures merely because of speculation as to possible future difficulties.

> At this point in the 20th century we are quite far removed from the dangers that prompted the framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes — or even of deep political division along religious lines — is remote, and *when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Wolman v. Walter,* 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part) (emphasis supplied).

C. For Establishment Clause Purposes, Governmental Actions Which Potentially Inhibit Religion Should be Distinguished From Those Which Potentially Advance Religion

1. INHIBITION OF RELIGION INFRINGES, IF ANYTHING, THE FREE EXERCISE CLAUSE, NOT THE ESTABLISHMENT CLAUSE.

Inhibition is by definition not establishment; it is rather the opposite of establishment. Yet, paradoxically, the court below predicated its finding of establishment *upon* inhibition. The court proposed a dilemma: in order for the state to guard against the risk of its teachers inadvertently advancing religion in nonpublic schools, the state will have to undertake an overbearing surveillance of those schools. This surveillance is the entanglement which the court fears. It features "state inspectors prowling the halls of parochial schools and auditing classroom instruction." *Felton, supra,* 739 F.2d at 67 (citation omitted).

But such surveillance would hardly *establish* that school's religion. The very purpose of the surveillance would be to prevent religion from infecting state-supplied remedial instruction. Consequently, if that surveillance is affecting religion at all, it is inhibiting it. Such inhibiting surveillance may abridge the free exercise of religion[17] but it most certainly does *not establish* religion.

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[17]It also may *not* offend the Free Exercise Clause, depending on the amount of intrusion necessary. The record in this case shows that effective supervision required only monthly audits of public school classes by public school supervisors. *See, Felton, supra,* 739 F.2d at 53.

2. TAXPAYER PLAINTIFFS LACK STANDING TO RAISE NONPUBLIC SCHOOLS' POTENTIAL FREE EXERCISE CLAIMS.

The spectre of "state inspectors prowling the halls of parochial schools" suppressing religion is certainly ominous. Nevertheless, it is ominous not to taxpayers, but to those whose religious freedom is thereby threatened.[18]

Interested would-be plaintiffs cannot acquire standing by virtue of some "shared individuated right to a government" that does not prohibit the free exercise of religion. *See Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 482 (1982). Article III requires a real or threatened injury. *Id.*, at 472. In fact, in *McGowan v. Maryland,* 366 U.S. 420 (1961), the Court rejected an attempt by plaintiffs to raise the free exercise rights of third parties. In that case, the Court held that appellants lacked standing because they

> allege[d] only economic injury to themselves; *they [did] not allege any infringement of their own religious freedom* due to Sunday closing . . . . *McGowan, supra,* 366 U.S. at 429 (emphasis supplied).

So too here. Plaintiff's anxiety for the free exercise rights of nonpublic schools is misplaced. Individual nonpublic schools are free to refuse any or all government aid which they feel is intrusive. In any event, both nonpublic schools and their students are certainly capable of enforcing their own free exercise rights.

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[18]*Flast v. Cohen,* 392 U.S. 83, 104 n. 25 (1968), expressly declined to decide whether an assertion of the free exercise claims of third parties would be sufficient to confer taxpayer standing.

Accordingly, plaintiffs such as appellees should not be permitted to urge their dilemma: i.e., that in order to prevent public school teachers from advancing religion in nonpublic schools, their supervisors must inhibit it. Taxpayer plaintiffs, consistent with *Flast* and *Valley Forge*, should be permitted to complain only of possible establishment of religion. Consequently, they should be required to bear their burden of proof on that issue without the prop of a potential establishment-free exercise "dilemma."

III. NEW YORK CITY'S TITLE I PROGRAM HAS NOT TENDED TO ESTABLISH RELIGION.

Once the lower court's erroneous *per se* rules have been cleared away, the totality of the circumstances becomes obvious. The New York program has not established religion.

A. Appellees Have Failed To Prove That The Program Establishes Religion

At the outset of the evidentiary hearing in *National Coalition for Public Education & Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D. N.Y. 1980), appeal dismissed for want of jurisdiction, 449 U.S. 808 (1980) (hereinafter, *PEARL*), the plaintiffs conceded that they "had *no evidence* that New York City's Title I program was unconstitutional. "*Id.*, at 1252 (emphasis added). Since the record was overwhelmingly contrary to their position, plaintiffs had no choice but to concede this point. Nor do Appellees have any other choice.

The lower court noted that in the sixteen year history of New York's Title I program, there is no record of any

"complaint by a Title I teacher of interference by nonpublic school authorities or of any reports by supervisors that teachers have engaged in religious activity." *Felton, supra,* 739 F.2d at 53. Indeed, the record affirmatively shows that "parochial school officials have no voice in the initial assignment of a Title I teacher." *PEARL, supra,* 489 F. Supp. at 1256. Title I teachers are carefully instructed that they are accountable only to Title I supervisors, not to nonpublic school officials. *Felton, supra,* 739 F.2d at 53. Title I teachers similarly are ordered not to become involved with a nonpublic school's religious activities, not to introduce any "religious matter" into their teaching, and not to discuss religious matters with nonpublic school teachers. *Id.* Title I teaching materials and equipment are

> labeled as property of the Board . . . are locked in storage and filing cabinets when not in use and are subject to an annual inventory. *Id.*

Finally, Title I classrooms are required to be "free of religious symbols and artifacts." *Id.*

"A federal court does not sit to render a decision on hypothetical facts . . . ." *Wheeler v. Barrera,* 417 U.S. 402, 427 (1974). Here, the record is unequivocal that New York's Title I program has not "in reality . . . establish[ed] a religion or religious faith, or tend[ed] to do so." *Lynch, supra,* 104 S. Ct. at 1361. In fact, it has not even come close.

Appellees simply have failed to prove their case.

B. The Lemon Criteria Illustrate That New York's Program Does Not Establish Religion

Viewed as guidelines, and not *per se* rules, the *Lemon* criteria demonstrate that the New York Program does not establish religion.

1. THE PROGRAM HAS A SECULAR PURPOSE.

The purpose of Title I is not in doubt. The statute itself gives its purpose as assisting

> local educational agencies to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children. 20 U.S.C. § 2701 (1982). *See also* 20 U.S.C. § 3801 (1982).

Accordingly, the *PEARL* court easily determined "that the purpose of the statute was to give aid to needy children, regardless of where they attend school." *PEARL, supra,* 489 F. Supp. at 1258. Cf. *Wheeler v. Barrera, supra,* 417 U.S. at 405-406 ("the legislative aim [of Title I] was to promote needed assistance to educationally deprived *children,* rather than to specific schools . . . .") (emphasis in original; footnotes omitted).

2. THE PROGRAM'S PRIMARY EFFECT IS TO BENEFIT CHILDREN.

Title I does not provide any assistance directly to nonpublic schools. Rather, Title I bestows its aid — remedial instruction — directly on disadvantaged children. Consequently, as the *PEARL* court noted, "Title I clearly adheres to the child benefit principle established in *Everson* and *Allen*." *PEARL, supra,* 489 F. Supp. at 1259.

Moreover, Title I provides its benefit to a broad class of disadvantaged children. In *Mueller v. Allen,* 103 S. Ct. 3062, 3068 (1983), this Court found it significant that the tax deduction at issue was "available for educational expenses incurred by all parents, including those whose children attend non-sectarian private schools or sectarian private schools."[19] In the present case nonpublic school students are a distinct minority among all Title I beneficiaries. In 1981-82, nonpublic school students were only 13.2% of the total number of benefitted students. *See Felton, supra,* 739 F.2d at 51.

It is probably true that some *incidental* benefit accrues to the nonpublic schools. But "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Lynch, supra,* 104 S. Ct. at 1364, quoting *Nyquist, supra,* 413 U.S. at 771. Cf. *Hunt v. McNair, supra,* 413 U.S. at 743 (rejecting argument that aid to one aspect of an institution frees it to expend resources on religious ends). The direct beneficiaries are clearly the disadvantaged children, in both public and nonpublic schools, who now have the opportunity for remedial help.

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[19]Cf. *Widmar v. Vincent,* 454 U.S. 263, 274 (1981) ("the provision of benefits to so broad a spectrum of groups is an important index of secular effect")

3. THE PROGRAM IS NOT EXCESSIVELY ENTANGLING.

There is no evidence whatever that New York's Title I program has in any way occasioned "the active involvement of the sovereign in religious activity." *See Walz, supra,* 397 U.S. at 668. Monthly visits to public school classes by public school supervisors, for the express purpose of preventing the accidental advancement of religion, is simply not an establishment of religion. If it were an overbearing surveillance of the nonpublic schools themselves, then it might be an *inhibition* of religion. But government supervisors supervising only government-sponsored classes, with monthly visits, are hardly overbearing. In any event, potential inhibition of religion is not an *establishment* of religion.[20]

Thus the totality of the circumstances, viewed with or without the *Lemon* criteria, plainly demonstrates that New York City's Title I program has not tended to establish religion.

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[20]This Court also has been concerned about the potential for political entanglement. Since this case is not an instance of direct subsidy to nonpublic schools, political entanglement is not an issue. *See Lynch, supra,* 104 S. Ct. at 1364-65; *Mueller, supra,* 103 S. Ct. at 3071, n. 11.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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